

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the	)	MB Docket No. 05-311
Cable Act	)	
	)	

The Virginia Cable Telecommunications Association ("VCTA"), by its counsel, hereby submits comments on implementation of Section 621 (a)(1) of the Cable Act, 47 USC §541(a)(1), as requested in the Commission's Notice of Proposal Rulemaking, FCC 05-189.

The VCTA is the trade association of the cable television industry in the Commonwealth of Virginia, representing the interests of cable television operators and their competitive local exchange carrier affiliates. Its members and their affiliates provide cable services, high speed internet (cable modem) services and facilities-based telephone services to Virginia consumers.

**INTRODUCTION AND SUMMARY**

There is already robust competition for video programming in Virginia, with no evidence that the local franchising process is serving as an unreasonable barrier to entry. Verizon is in the process of installing its fiber to the home FIOS system in high-income areas throughout Virginia, claiming that this is being done as an upgrade of and integral part of its telephone system, and that a cable franchise is only required to actually activate cable service to subscribers. Local franchising authorities in Virginia have a history of

granting competitive cable franchises (including four cable franchises awarded to Verizon in the last year), and Verizon's unwillingness to accept build-out requirements of other Virginia local franchising authorities has been its principal impediment to obtaining more franchises. Virginia's "level playing field" statute has encouraged true competition, not acted as a barrier to entry, and proposed legislation now before the Virginia General Assembly will speed competitive entry even further, while insuring that all competitors in a market are competing on equal terms.

The VCTA respectfully suggests that the Commission lacks the authority under Section 621(a)(1) to override key aspects of local franchising to benefit new entrants, and should instead look more broadly at its ability to enhance a competitive market for all video providers by reducing excessive federal and state regulation.

**A. There is No Need to Pre-empt Local Franchising  
Authority Over the Grant of a Franchise  
in Order to Encourage Competition.**

Video competition is already alive and well in Virginia. The Commission has already recognized that the nationwide availability of at least three comparable multi-channel alternatives – video programming from at least one cable operator and two national DBS providers – has already resulted in a fierce competitive struggle to capture customers with services and prices that provide the greatest value.<sup>1</sup>

Apart from the availability of two national DBS providers throughout Virginia, local franchising authorities have not been an unreasonable barrier to entry for cable competition in Virginia.

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<sup>1</sup> See e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 20 FCC Rcd 2755, 2757 (2005).

Prior to 2005, there has been a history of awarding competitive cable franchises, fostered by Virginia's "level playing field" statute. Starpower (now RCN) has been able to successfully obtain franchises in Arlington County and the City of Falls Church, both northern Virginia urban areas, competing against Comcast and Cox. Gatehouse Networks has been able to successfully obtain limited area franchises for portions of Loudoun and Prince William Counties, competing against Comcast. Cox and Adelphia have overlapping franchises in all of Spotsylvania County and portions of Stafford County and the City of Fredericksburg. Baycreek Communications has been able to obtain a franchise to compete against Charter in the Town of Cape Charles, on Virginia's Eastern Shore, while the Bristol Virginia Utilities Board has obtained cable franchises to compete against Charter in the City of Bristol and in Washington County in the southwestern tip of Virginia.

Since Verizon's business decision to re-enter the video programming distribution world, Verizon has been able to obtain four cable television franchises in Virginia, all in high-income areas of northern Virginia: Fairfax County (the state jurisdiction with the largest population – over 1,000,000), Fairfax City and Herndon in 2005, and Falls Church in 2006. Meanwhile, Cavalier Telephone, a full-service, facilities-based Mid-Atlantic local exchange company with over 200,000 customers, has announced successful tests of an IP-based video programming service to be delivered over leased Verizon DSL lines, with plans to commence service in the Richmond and Hampton Roads population centers.<sup>2</sup>

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<sup>2</sup> See information on the Cavalier Broadband TV Service at [www.cavtel.com/broadbandtv/what\\_is\\_it.shtml](http://www.cavtel.com/broadbandtv/what_is_it.shtml). Since this service will be delivered to non-Cavalier telephone customers over Verizon DSL copper lines, Cavalier's principal long-term business challenge in

Two other major telephone companies, AT&T and Ntelos, have also expressed an interest in offering video services in Virginia in the very near future.

It should be clear from the foregoing summary that cable service competition (in addition to DBS competition) is active and on the verge of exploding in Virginia, without Commission action.

Verizon can scarcely argue that its failure to obtain more cable television franchises in Virginia has delayed its construction and deployment of broadband services. Verizon has been engaged in rapid-speed construction of its fiber to the home FIOS system in high-income areas throughout Virginia since 2004, claiming that this construction was being done as an upgrade and integral part of its telephone system, and that a cable franchise is only needed to actually activate cable service to subscribers. Verizon, as a telephone company, operates under minimal oversight of its construction practices by the State Corporation Commission of Virginia. While Verizon may now be seeking cable franchises in order to activate video services (in addition to FIOS internet and telephone services), its claims of delays simply do not ring true.

Local franchising authorities in Virginia clearly want more video competition, and would welcome Verizon's provision of cable television services in their communities; but are concerned that they cannot ignore their obligations under Section 621(a)(3) to assure that service is not denied to potential subscribers based upon income, or their rights under Section 621(a)(4)(A) to allow a cable system to become capable of providing cable service to all households in the franchise areas.

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cable competition may be Verizon's replacement of UNE copper lines with Verizon fiber to the home.

Verizon's FIOS upgrade in Virginia, based upon observations of both cable operators and local governments, is concentrated in high-income areas, not providing universal upgrade opportunities throughout a community. While Verizon may deny this, its business plan clearly seems designed to deliver FIOS services first to high-income areas, with no guarantees of that service ever reaching low-income areas. Since Verizon, as the incumbent local exchange carrier in most of Virginia, already has telephone facilities in place in both high-income and low-income areas in the state, its refusal to agree to a build-out schedule in most communities, or guarantee to offer cable services to all residents in a community, is truly striking.<sup>3</sup> Based on anecdotal information, Verizon's refusal to build-out all areas of a locality within a definite time schedule (particularly when coupled with an option to abandon a franchise after three years) are the key factors in Verizon's delays in obtaining cable franchises elsewhere in Virginia.<sup>4</sup>

The Virginia Senate and House of Delegates have recently passed identical bills<sup>5</sup> which, if enacted into law, will speed up the franchising process for telephone company

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<sup>3</sup> African-American leaders in Virginia have particularly expressed concern that Verizon's focus on a FIOS upgrade in high-income areas, its so-called "fiber to the rich" plan, will deepen the "digital divide" between upper and lower income access to high speed internet services. See comments of Delegate Donald McEachin to the Virginia House of Delegates, as reported in the January 19-21, 2006 Richmond Free Press, p. 1, on Verizon's entry into the cable marketplace, "Will this truly bring in competition or will Verizon be allowed to cherry pick, as they do now with Internet service"?

<sup>4</sup> Verizon's four Virginia franchises are all high-income areas. Verizon agreed to provide cable service to all residential areas of each of the Town of Herndon, Falls Church and Fairfax City, which presumably satisfied their Councils that Verizon was likely to serve all the residents of those relatively compact municipalities. Verizon agreed to build-out 100% of Fairfax County, with the largest and wealthiest population in Virginia, and was able to obtain a franchise there in a little over two months.

<sup>5</sup> 2006 SB706, 2006 HB1404. See Virginia General Assembly Legislative Information System, <http://leg1.state.va.us>. For either of these bills to become law, it must now be passed by the other chamber, and signed by the Governor. If this occurs, the resulting legislation will become effective July 1, 2006. The Virginia legislation allows localities to negotiate franchises with new entrants on whatever terms they desire, but the incumbent cable provider may opt into those new terms. An ordinance cable franchise mechanism is also established to allow telephone companies a fast entry into the market, with standardized terms (and allowing incumbent cable operators to also obtain the same terms).

entrants, but more importantly, guarantee a level playing field by reducing local cable regulation as a result of the changing competitive environment.

Even without that legislation, video competition in Virginia is flourishing, and there are no practices by Virginia local franchising authorities which are an unreasonable barrier to entry requiring federal pre-emption. If the proposed Virginia legislation is enacted, the state will have minimized all local regulations equally for all competitors, and encouraged even more entrants into the field of video competition by lowering all regulatory burdens.

The existence of significant competition, along with a sound exercise of public policy at the federal level in considering the principles of federalism, would suggest that the Commission should defer any consideration of pre-emptive action until Virginia's efforts to further promote competition can be fully evaluated.

**B. The Commission Lacks The Authority to  
Over-Ride Local Franchising Authority Determination of Build-Out  
or Universal Service Requirements, But Should Seek to Enhance  
Competition by Reducing All Unnecessary Federal  
And State Regulation of a Competitive Marketplace.**

The Commission's tentative conclusion that it has authority under Section 621(a)(1) to regulate local franchising authorities in their award of competitive franchises seems unjustified, particularly if such authority were to be exercised in the form of regulations which intruded on reserved local franchising authority powers.

Section 621(a)(1) should not be read in isolation, but in the context of the dual federal and local regulatory structure which has historically characterized cable television

regulation. In particular, Section 621(a)(1) must be read in the context of Section 601, which details the purposes and goals of Title VI. Those purposes and goals do not distinguish between incumbent cable providers and new entrants. One purpose of Title VI is to encourage “the growth and development of cable systems”<sup>6</sup>, not just new entrants, and to “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems”<sup>7</sup>. There is no purpose which can justify an easy entry for new entrants at the expense of competitive neutrality and the reserved regulatory rights of local franchising authorities.

Section 621(a)(1) also must be read in the context of the remaining portions of Section 621. Section 621(a)(3) specifically imposes on localities, in awarding a franchise, the obligation of determining that access to cable services is not denied based upon income; and Section 621(a)(4)(A) similarly addresses the rights of a locality, in awarding a franchise, to see that a cable system is capable of providing service to all residents in a franchise area. These related issues of redlining and build-out are clearly reserved to local franchising authorities.

Perhaps most strikingly, after providing that a local franchising authority may not unreasonably refuse to award a competitive franchise, Section 621(a)(1) goes on to provide an express remedy; the unsuccessful applicant may appeal the decision to a court under Section 635. Presently a court, on a case by case basis, can exercise judgment as to whether a particular refusal is unreasonable. Nothing in the section suggests that the

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<sup>6</sup> Section 601(2), 47 U.S.C. §521(2).

<sup>7</sup> Section 601(6), 47 U.S.C. §521(6).

Commission is authorized to create an alternative remedy or set of requirements through rulemaking.

The VCTA would respectfully suggest that the Commission should focus on relieving all competitors of unnecessary state and federal regulations. No other industry has regulations imposed on it to the extent of cable television, and that factor alone is a major deterrent to any new entrant into the cable television business.<sup>8</sup>

### **CONCLUSION**

The vigorously competitive video market with DBS which exists in Virginia has historically been supplemented by local competitive cable franchises in a number of localities. Verizon, an incumbent local exchange carrier, is obtaining franchises in Virginia under the existing law, and other companies such as Cavalier and AT&T are about to enter the market. Proposed changes in Virginia state law are likely to be enacted to facilitate competition, but reduce regulatory burdens on all providers.

Given that environment, action by the Commission is only likely to delay entry rather than encourage it, or potentially stifle competition through preferential treatment. Reductions of regulatory burdens for all providers, not special treatment for new entrants through strained interpretations of the Cable Act, are the best way to guarantee long-term successful competition in the video programming distribution marketplace.

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<sup>8</sup> In fact, Cavalier Telephone, as it seeks to provide its cable "IPTV" service in Virginia, is willing to consider obtaining local Virginia cable franchises, but strenuously wishes to avoid unacceptable federal burdens if it is classified as "cable operator" providing "cable service" and operating a "cable system" for federal purposes. The proposed Virginia legislation, 2006 SB706/2006 HB1404, contains a section (§15.2-2108.31) to address that concern.



**Federal Communications Commission**

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Respectfully submitted,

**VIRGINIA CABLE  
TELECOMMUNICATIONS ASSOCIATION**

By Its Counsel

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